United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2062

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P/S

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

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In the Matter of the Application of
ALBERT MINTZER,

Petitioner-appellant,

For a Writ of Habeas Corpus,

-against-

File No.
75-2062

STATE OF NEW YORK,

Respondent-appellee,

PUBLIC SERVICE MUTUAL INSURANCE
COMPANY,

Respondent.

- -x

REPLY BRIEF OF PETITIONER-APPELLANT

ALBERT MINTZER,
Petitioner-Appellant Pro Se,
242 West 38th Street,
New York City, 10018
Tel. Ch4-5958
Ch4-5471

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Preliminary Statement

The brief of respondent-appellee contains factual references, under the caption, "The Case" , that are not accurate. They are catologued below. In addition, the authorities that respondent cites are inapposite.

The facts and state trial proceedings are fully discussed in petitioner's state Court of Appeals brief copies of which will be submitted to this Court on the argument. Said brief is quite voluminous and is intended to guide this Court for reference purposes on matters that it may wish to become more familiar. In essence, this appeal raises only questions of law on a state trial record involving factual matters not in dispute.

Point One

THE EVIDENCE ADDUCED IN SUPPORT OF THE WITHDRAWN COUNT 2 CHARGE OF CONVERSION OF TRUST FUNDS MUST BE DEEMED, AS A MATTER OF LAW, TO HAVE INFECTED THE JURY WITH PREJUDICE AND CONFUSION WITH THE REULT THAT IT FOUND PETITIONER GUILTY ON COUNTS 3 AND 5.

THE WITHDRAWAL OF COUNT 2 BY THE TRIAL JUDGE DURING THE JURY CHARGE WAS FUNDAMENTALLY UNFAIR AFTER PETITIONER'S MOTIONS TO DISMISS WERE DENIED ON THE PEOPLE'S CASE AND THE WHOLE CASE.

The withdrawn count 2 charge of conversion of trust funds involves conduct <u>after</u> the subscription monies were received by petitioner's underwriting company, Sire Plan Portfolios Inc.

The count 3 charge, upon which petitioner was convicted, involves conduct which resulted in the subscriptions being <u>received</u>.

If the count 2 conversion charge had not been part of the state court indictment, none of the massive evidence adduced during practically the entire 18 day trial would have been admissible in support of count 3.

At page 5 of appellee's brief, it is stated:

> "By April 20, 1961, Mintzer had raised $62,100.00 from the public. <u>Instead of holding these monies in trust</u>, as <u>represented</u> in the offering circular, he immediately commingled said sum with other funds and wrongfully disbursed it as the exigencies of the situation required for personal reasons and for corporate entities unrelated to sire 30th Street Plan, Inc."

This statement is not correct, as irrebutably established by the trial record.

The respondent's state trial theory, as repeated now in this Court, was that all subscriptions were required to be kept in trust until consummation of the acquisition of title to the real estate to be acquired with the proceeds of the public offering.

It is emphasized and not disputed that only $87,500. was raised of the $300,000 sought to be raised to consummate this real estate acquisition.

The respondent was well aware that Section 352-e(1b) and Section 352-h of the General Business Law, upon which the larceny charge was based, both provide that all real estate syndication funds, publicly raised, were required to "remain in trust until actually employed in connection with the consummation of the transaction (and that if insufficient funds are raised) to effectuate the consummation of the transaction . . . . . .then all the moneys so collected less such amounts actually employed in connection with the consummation of the transaction shall be fully returned to the investors. . . ."

At no place in respondents brief to this Court has it made reference to the underlined statutory language above quoted.

Although it was the insistent theory of the respondent at the trial that all subscriptions were required to be held in trust until consummation, not one of the five counts

of the indictment charges larceny of $87,500. which is the amount actually raised. This amount is not even mentioned in respondent's brief to this Court.

The reason for this omission becomes quite apparent in the light of the fact that the respondent credited petitioner at the trial with about $53,000 which the prosecution conceded petitioner was entitled to under the terms of the offering circular.

What is interesting and important was how this credit of $53,000 was arrived at. As testified to by the witness, Rom, an accountant in the employ of the Attorney General, $30,000 was credited against the deposits made by petitioner's company under the contract of sale for the purchase of the property to be acquired; some $13,000 was credited against underwriting commissions to which petitioner's underwriter affiliate was entitled, and about $10,000 credit was given for the interest payments which were distributed to the subscribers by respondent's issuer affiliate, Sire 30th Street Plan Inc.

With respect to the approximately $35,000 which was left after the credit of $53,000 (approximately), petitioner testified at the trial as to the manner in which he claimed to have applied said balance "in connection with consummation" but the jury was not permitted to pass upon this issue because the trial judge had adopted the trial theory of the respondent in charging the jury that all subscriptions were required to

be held in trust and not used until and for actual consummation of title acquisition.

The following references, at page 6 of respondent's brief to this Court, are not correct, to wit:

That petitioner's offering circular stated "that all monies would be kept in trust and that the purpse 'is' to acquire the 30th Street building".

The statement in the offering circular appears at page 16 of petitioner's state Court of Appeals brief to which this Court is respectfully referred. That the public investors were apprised of the fact that petitioner was to be permitted to pay out part of the proceeds for underwriting commissions is established by the following language in the offering circular: "Our underwriter affiliate has agreed to reimburse its selling commissions to the extent required to make any such refunds".

It is emphasized that petitioner's offering circular went beyond the requirements of the statute, since the law only required the Issuer to undertake to return simply those portions of the subscriptions which were not actually used in connection with the consummation of the transaction. Petitioner, however, undertook to make a full refund if the transaction for which the money was sought did not close. He was prevented from so doing by the initiation of this prosecution by the respondent.

Respondent's statement that petitioner "falsely

pretended that a trust fund had been kept and was being kept for the sole purpose of purchasing the building . . . .(and that) these funds were not kept in trust and that the purpose of the offering was not to acquire the building" are likewise not correct.

* * * * * * * *

It cannot be disputed that the entire trial, except for a small portion thereof, was taken up by the respondent with evidence that it adduced in support of the count 2 charge of conversion of trust funds.

As quoted at page 10 of petitioner's main appellant's brief to this Court, and now again repeated, the trial judge conceded, after all the evidence was in, ". . . .the major count, as I see it, is 1302 (of the Penal Law), and that is mishandling of trust funds. . . ."

The respondent agreed. As stated by its prosecutor, "I recognize section 1302 of the Penal Law is the major crime charged in this indictment. . . ."

These admissions, by the trial judge and prosecutor, at a time when the evidence, on both sides,had been completed, and after the trial judge had, on the People's case and the whole case, denied the vigorously argued motions of petitioner to dismiss the conversion count 2, constitutes a finding by the trial judge that the evidence adduced by respondent, in support of count 2, was sufficient and made out a prima facie case for submission to the jury.

Consequently, the withdrawal of count 2 from the jury, during the trial judge's charge, without prior notice to petitioner, after the jury had become infected with a mass of evidence in support thereof and after the jury had been subjected to an inflammatory summation by the prosecutor, most of which devoted to the evidence adduced in support of count 2, - - -all these occurences not only establish actual prejudice and fundamental unfairness, but, also, "must be presumed to have prejudiced (petitioner)", Duncan v. Carter, 299 F. 2d 179, which presumption respondent has made no effort to rebut.

Respondent concludes his brief with the statement ". . .this Court has already found that there was evidence supporting the conviction", citing the decision of this Court on petitioner's first habeas proceeding. An examination of said decision (403 F. 2d 42) does not contain any such finding.

Respectfully submitted,

ALBERT MINTZER,
Petitioner-Appellant Pro Se.

Dated July 2nd, 1975.

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